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106 FERC ¶ 61,264
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Devon Power LLC Middletown Power LLC Montville Power LLC NRG Power Marketing Inc.	Docket Nos. ER04-464-000 and ER04-464-001
ISO New England, Inc.	Docket Nos. ER04-23-000, ER04-23-002, and ER04-23-003

ORDER CONDITIONALLY ACCEPTING RMR AGREEMENTS, CONSOLIDATING DOCKETS, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 22, 2004)

1. In this order, the Commission conditionally accepts for filing Reliability Must Run Agreements (RMR Agreements) between ISO New England, Inc. (ISO-NE) and Devon Power LLC, Middletown Power LLC, Montville Power LLC, entered into by NRG Power Marketing Inc. (NRG) (collectively Applicants) on their behalf. The RMR Agreements cover the Middletown Station, the Montville Station, and Devon Station Units 11-14. For the reasons discussed below, the Commission will conditionally accept the RMR Agreements, suspend the rates contained therein for one day, subject to refund, set the rates for hearing and settlement judge procedures, and consolidate Docket No. ER04-464-000, et al., with Docket No. ER04-23-000, et al. This order benefits customers by ensuring that generating units needed for grid reliability will continue to operate.

Background

2. On January 16, 2004, and amended on January 22, 2004, the Applicants submitted for filing, pursuant to Section 205 of the Federal Power Act (FPA)[1] and Part 35 of the

[1] 16 U.S.C. § 824d (2000).

Commission's regulations[2], RMR Agreements among the Applicants and ISO-NE. The RMR Agreements apply to three generating stations located in Southwestern Connecticut – Montville Station, Middletown Station, and Devon Station Units 11-14. These facilities comprise 770 MW of capacity, and ISO-NE has determined that they are needed for reliability purposes in the area.

3. These Applicants, and Norwalk Harbor LLC (Norwalk), filed similar RMR Agreements with the Commission on February 26, 2003, in Docket No. ER03-563-000. PPL Wallingford Energy LLC (Wallingford) also filed with the Commission similar agreements on January 16, 2003, in Docket No. ER03-421-000. In a series of orders resolving these cases, the Commission rejected the widespread use of RMR agreements as a default tool to provide cost recovery to generating facilities that must run to ensure reliability because the units' cost-of-service (COS) under such contracts are recovered through payments outside of the market, and directed ISO-NE to establish new bidding mechanisms to provide those generators an opportunity to recover their costs through the market.[3] The resulting Peaking Unit Safe Harbor (PUSH) bidding mechanism allows peaking units with capacity factors of 10 percent or less during 2002 operating within Designated Congestion Areas (DCAs) to raise their bids so as to allow them the opportunity to recover their fixed and variable costs through the market. The Commission noted that the PUSH mechanism was to be in effect on a temporary basis, and in the April 25 Order directed ISO-NE to file, by March 1, 2004, a mechanism establishing a locational installed capacity (LICAP) market or regional deliverability requirements, for implementation by June 1, 2004, "so that capacity within DCAs may be appropriately compensated for reliability."[4] In accordance with the April 25 Order, ISO-NE submitted a compliance filing to the Commission on March 1, 2004, in Docket No. ER03-563-030, with a requested effective date of June 1, 2004.

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[2] 18 C.F.R. § 35 et seq. (2003).

[3] Devon Power LLC, et al., 102 FERC ¶ 61,314 (2003) (March 25 Order); Devon Power LLC, et al., 103 FERC ¶ 61,082 (2003) (April 25 Order); PPL Wallingford Energy LLC, 103 FERC ¶ 61,185 (2003) (May 16 Order); Devon Power Company, et al., 104 FERC ¶ 61,123 (July 24 Order); PPL Wallingford Energy LLC, et al., 105 FERC ¶ 61,324 (2003) (December 22 Order) (collectively, PUSH Orders).

[4] April 25 Order at P 37.

4. In the instant filing, Applicants contend that the PUSH bidding mechanism has failed to provide adequate cost recovery for the facilities at issue.[5] Specifically, Applicants state that the units covered by the proposed RMR Agreements have recovered only 27 percent of their fixed costs under PUSH bidding.[6] They allege financial losses due to unrecovered fixed costs from January 2003 to October 2003 of over $52 million. Based on this evidence, Applicants argue that the Commission should approve these RMR Agreements to allow the facilities to fully recover their costs. Applicants suggest that absent such recovery, they will be forced to retire the plants.[7]

5. The proposed RMR Agreements track the Form Cost-of-Service Agreements contained in the New England Power Pool's (NEPOOL) Market Rule 1.[8] Specifically, the RMR Agreements provide that Applicants will be paid a monthly Fixed Cost Charge by ISO-NE, through NEPOOL's Monthly Settlement Process. This charge is determined under Article 4 of the Agreements, which sets forth the formulae for computing each Applicant's COS. The RMR Agreements also provide that the Applicants will submit monthly bids for energy and ancillary services generated by their facilities, and will credit against the monthly Fixed Cost Charge any amounts received from the market which exceed the Stipulated Bid levels, determined by Article 3.2 of the agreements.[9] As proposed, the RMR Agreements would have a term of one year, recurring, but would terminate on the earlier of two occurrences: (1) 120 days after ISO-NE provides a notice

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[5] Applicants state various reasons why they believe PUSH is failing to provide adequate cost recovery for their facilities, based in significant part on an ISO-NE analysis of PUSH entitled "A Review of Peaking Unit Safe Harbor (PUSH) Implementation and Results" issued on December 3, 2003 (ISO-NE PUSH Report), and filed with the Commission in ER03-563-025.

[6] Applicants' Transmittal Letter at 5.

[7] See, e.g., id. at 3, 5, and 8.

[8] Market Rule 1, located in NEPOOL's FERC Electric Rate Schedule 7, contains the scheduling procedures and other provisions pertaining to the operation of the NEPOOL market.

[9] Stipulated Bid Costs are self-adjusting formulary rates that reflect agreed upon formulas and marginal costs for fuel, variable O & M, and environmental permits and allowances. Stipulated Bid Cost formulas, costs, and sources are defined in the RMR Agreements and are reported to ISO-NE.

of termination to the Applicants, or (2) 90 days after a locational installed capacity (LICAP) market has been implemented in NEPOOL. The Applicants request an effective date for the agreements of January 17, 2004.

6. Applicants also request that the Commission consolidate this proceeding with the ongoing hearing and settlement judge procedures underway in Docket No. ER04-23-000, because this proceeding and the proceeding dealing with the COS for Devon Units 7 and 8 involve the same parties, similar issues of law and fact, similar RMR agreements and similar reliability issues.[10]

Notice of Filings, Protests, and Interventions

7. Notice of Applicants' filing was published in the Federal Register on February 6, 2004,[11] with comments, protests or interventions due on or before February 12, 2004. Timely motions to intervene were filed by Mirant Americas Energy Marketing, LP, Mirant New England, LLC, Mirant Canal, LLC, and Mirant Kendall, LLC (collectively Mirant), PPL EnergyPlus, LLC and PPL Wallingford Energy LLC (collectively PPL), and Northeast Utilities Service Company on behalf of the NU Operating Companies and Select Energy, Inc. (collectively NUSCO).

8. Timely motions to intervene with comments were filed by ISO-NE and PSEG Energy Resources & Trade LLC (PSEG).

9. Timely motions to intervene with protests were filed by the Connecticut Office of Consumer Counsel (CT OCC), Richard Blumenthal, Attorney General for the State of Connecticut (CTAG), United Illuminating Company (UI), the Connecticut Department of Public Utility Control (CT DPUC), and Dominion Energy Marketing, Inc. (DEMI). CTAG and CT DPUC each filed an errata to its motion to intervene and protest. Connecticut Municipal Electric Energy Cooperative (CMEEC) filed a motion to intervene, motion to reject or, in the alternative, protest and opposition to request for consolidation.

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[10] See ISO New England, Inc., 105 FERC ¶ 61,263 (2003) (December 1 Order) (accepting an extension of the RMR contracts applicable to Devon Units 7 and 8 and setting the proposed Reliability Charges in the contracts for hearing and settlement judge procedures).

[11] 69 Fed. Reg. 5851 (Feb. 6, 2004).

10. On February 27, 2004, Applicants filed a Motion for Leave to Answer and Answer.

11. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,[12] the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[13] prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept the answer of Applicants because it has provided information that assisted us in our decision-making process.

Discussion

Need for RMR Agreements

12. ISO-NE supports the proposed RMR Agreements, stating that the agreements "are needed to meet continuing chronic undersupply of generation in the Connecticut area."[14] PSEG, without protesting the RMR Agreements filed in the instant docket, generally comments that the need for RMR agreements highlights market dysfunctions, and urges ISO-NE to file a locational capacity rule as a long-term solution to those dysfunctions.[15]

13. CT OCC, CTAG, UI, CT DPUC, DEMI and CMEEC (collectively Protestors) all submitted protests in this Docket. They each argue that acceptance of the proposed RMR Agreements would be contrary to the Commission's PUSH orders, particularly the April 25 Order, in which similar agreements were rejected by the Commission in favor of a market-based approach to providing cost recovery to generating units needed for reliability. CT OCC contends, for example, that the Commission should reject the RMR Agreements on the basis of *res judicata*, because similar contracts were rejected by the Commission in the April 25 Order and subsequent issuances, and "there are no new circumstances, or other causes, to revisit the claim."[16] The other protesting parties argue more generally that the Commission's April 25 Order, and the critique of the broad use of

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[12] 18 C.F.R. § 385.214 (2003).

[13] 18 C.F.R. § 385.213(a)(2) (2003).

[14] Motion to Intervene and Comments of ISO-NE at 2.

[15] Motion for Leave to Intervene and Comments of PSEG at 4, 8.

[16] Motion to Intervene and Protest of CT OCC at 7-8.

RMR agreements contained in that order, dictates that the Commission reject the RMR Agreements in the instant docket.

14. In response to Applicants' discussion of their experience under the PUSH mechanism, CT OCC and CMEEC contend that PUSH was not intended to guarantee complete cost recovery for eligible units, but instead was meant to provide an opportunity for such units to recover their fixed costs. CMEEC characterizes the goal of the PUSH mechanism as giving eligible units "an opportunity to recover their costs through the market," and states that "[t]his objective is consistent with any functioning competitive market."[17]

15. Additionally, CTAG, UI, and CMEEC each argue that RMR treatment for these units is not necessary. The CTAG contends that Applicants' rationale supporting the RMR Agreements (that its fixed-cost recovery under PUSH is too low to justify operating the plants) is "contrary to economic theory," because "'fixed costs' are 'sunk' investments," and "[t]he critical issue . . . is whether the plants are covering their variable costs, which they clearly are" according to Applicants' evidence.[18] CMEEC also concludes that the proposed agreements are unnecessary and that the Applicants' failed to adequately prove their necessity, in part because "under PUSH, each of the units at issue has recovered all of its respective variable costs."[19] CMEEC additionally contends that Applicants' failure to recover a greater percentage of the units' fixed costs may be "a result of their own strategic decisions" to bid the units at the top of the PUSH levels, thus resulting in fewer dispatches for those units.[20] UI argues that the RMR Agreements are unnecessary because the combination of the PUSH mechanism with ISO-NE's recently implemented Forward Reserve Market have allowed for greater cost recovery, and because the Commission is currently engaged in efforts to implement long-term market solutions to the problem faced by reliability units like the Applicants'.

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[17] Motion to Intervene, Motion to Reject or, in the Alternative, Protest and Opposition to Request for Consolidation of CMEEC at 9.

[18] Motion to Intervene and Protest of CTAG at 6.

[19] Motion to Intervene, Motion to Reject or, in the Alternative, Protest and Opposition to Request for Consolidation of CMEEC at 9.

[20] Id.

Commission Response.

16. The Commission will conditionally accept the RMR Agreements for filing, suspend the rates for one day, and set the rates for hearing and settlement judge procedures. We will condition the contracts to allow them to be in place for only a limited term, however, and will consolidate the instant docket with Docket No. ER04-23-000, et al., as discussed further below.

17. In the PUSH Orders, we rejected a request by these Applicants for RMR contracts, noting that under the market power mitigation rules and bidding procedures in the New England market as they existed at the time, "extensive use of RMR contracts undermine[d] effective market performance."[21] As a result, we concluded that "ISO-NE, rather than focusing on and using stand-alone RMR agreements, should incorporate the effect of those agreements into a market-type mechanism."[22] Based on this conclusion, we directed ISO-NE to modify its market power mitigation mechanism to incorporate PUSH bidding, to allow units needed for reliability an opportunity to recover their fixed and variable costs through the market.[23] We noted in our December 1, 2003 Order in Docket No. ER04-23-000, however, that while the PUSH Orders expressed our preference for market-based solutions to the problem of securing adequate revenues for units in congested areas which must run for reliability purposes, "the Commission did not preclude ISO-NE from using RMR agreements."[24]

18. The PUSH mechanism, in conjunction with other recent changes in the New England market, has achieved the Commission's goal of providing cost recovery through the market for many generating units required to operate for reliability purposes. Applicants acknowledge this in their filing, noting that Norwalk and Connecticut Jet Power LLC (another NRG affiliate) have not sought RMR contracts because they are achieving sufficient revenues through market mechanisms.[25] The Devon, Middletown and Montville units for which the RMR Agreements are sought in this case, however, are not faring as well under the PUSH rules. These units are older and less efficient, with

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[21] April 25 Order at P 29.

[22] Id.

[23] Id. at P 32.

[24] December 1 Order at P 21.

[25] Applicants' Transmittal Letter at 6.

higher marginal costs, and generally provide only operating reserves. As a result, the PUSH mechanism does not appear to be providing these units, which are still necessary to maintain reliability in the Southwest Connecticut DCA, with sufficient revenues to cover their costs.

19. In directing ISO-NE to establish the PUSH mechanism, we noted that PUSH was temporary, until a long-term market-based solution to the cost recovery problem could be implemented in New England.[26] The Commission believes that the expected implementation of a LICAP mechanism or regional deliverability requirements on June 1, 2004 will be an important initial step toward a long-term solution that values and recognizes the location of capacity, thereby providing both compensation to existing units and incentives for the entry of new generation where it is valued most highly.

20. In light of the actual operating experience of Applicants' generating facilities under PUSH, the continuing need for the units due to their location in the Southwestern Connecticut DCA, and the impending implementation of the permanent market-based solution the Commission seeks, we will conditionally accept the RMR Agreements for filing, effective January 17, 2004, subject to refund. However, the RMR Agreements subject to this order will be conditioned to terminate concurrent with the implementation of ISO-NE's LICAP mechanism or regional deliverability requirements, which should render the RMR Agreements unnecessary. Terminating the contracts will also ensure that they do not impede the development of adequate generation in New England.

Cost-of-Service Issues

21. Several of the Protestors and ISO-NE raise issues with regard to the rates provided in the contracts. CT OCC, CT DPUC and CMEEC protest Applicants' level of Administrative and General (A & G) expenses in the RMR Agreements, arguing generally that the proposed recovery of these expenses through these agreements exceeds the 18% cap on such expenses established in the July 24 Order.[27] CT DPUC also questions the Applicants' allocation of these expenses. ISO-NE and CMEEC also raise issues regarding the proposed 10.88 percent return on equity (ROE) provided in the RMR Agreements. CMEEC raises several additional issues regarding the Applicants' COS included in the RMR Agreements.

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[26] See, e.g., April 25 Order at P 32-33; July 24 Order at P 29.

[27] In the July 24 Order at P 47, the Commission determined that 18 percent "of production demand related O & M expenses would be a reasonable proxy in assigning A & G expenses to" Applicants' generating units.

Commission Response.

22. The Commission will establish hearing and settlement judge procedures to decide the rates contained in the RMR Agreements, with the exception of the ROE, and consolidate those procedures with the hearing and settlement judge procedures already instituted in Docket No. ER04-23-000.

23. The Commission finds that 10.88 percent is a reasonable level at which to establish the ROE. The Commission does not believe it necessary to revisit this issue in this proceeding given the Commission's recent analysis of an appropriate ROE for these facilities. In the April 25 Order, July 24 Order, and again in the December 1 Order, the Commission conducted a cost analysis which resulted in the acceptance of a 10.88 percent ROE, following the general policy of employing "the midpoint of the zone of reasonableness as the appropriate rate of return."[28]

24. ISO-NE and CT DPUC raise additional issues related to the COS contained in the RMR Agreements. ISO-NE states a concern that if the contracts are made effective on January 17, 2004, the Applicants could over-collect their variable costs because the units will continue to submit PUSH bids until the Commission accepts the contracts. CT DPUC argues in its protest that the rates included in Applicants' filing "are substantially excessive and should be suspended for the full five-month statutory period" pursuant to the FPA.[29] In their answer, Applicants assert that ISO-NE's concerns as to over-collection are unfounded, and can be corrected through refunds, and that in any event, the units cannot be bid at the stipulated bid levels in the contracts until they are approved by the Commission. In response to CT DPUC, Applicants contend in their answer that the proposed rates in the RMR Agreements are actually seven percent less than the fixed cost portion of their PUSH ceiling, determined by the Commission in Docket No. ER03-563, and thus are not substantially excessive.

25. Our preliminary analysis of the proposed rates indicate that they have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Accordingly, we will accept the proposed rates for filing, suspend them for one day to become effective on January 17, 2004, subject to refund, and set them for hearing and settlement judge procedures. The Commission declines to suspend these rates for the full five-month period as CT DPUC suggests, and

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[28] See id. at P 49; December 1 Order at P 26.

[29] See 16 U.S.C. § 824d(e) (2000).

instead will suspend them for one day and make them subject to refund. Preliminary analysis by Commission staff indicates that the rates contained in the RMR Agreements may not be "substantially excessive," and therefore the shorter one day suspension period is appropriate.[30]

26. To satisfy ISO-NE's concern regarding the over-collection of costs, the Commission will order Applicants to refund any revenues earned through PUSH bidding in excess of the Stipulated Bid levels in the RMR Agreements since January 17, 2004. Applicants may accomplish these refunds either through a cash refund to ISO-NE, or through a reduction in the fixed charges payable by ISO-NE under the RMR Agreements, as Applicants suggest would be appropriate.[31]

Term of the RMR Agreements

27. As proposed, the RMR Agreements have a term of one year, and automatically renew unless ISO-NE provides 60 days prior notice that it wishes to terminate. The contracts could also terminate on the earlier of two occurrences: (1) 120 days after ISO-NE provides a notice of termination to the Applicants, or (2) 90 days after the LICAP mechanism has been implemented in NEPOOL. Applicants state that the 90-day provision will provide an opportunity for the LICAP mechanism filed by ISO-NE to become effective and stabilize.[32] CMEEC protests the 90-day waiting period for termination of the contracts after the implementation of LICAP, and urges that this period be eliminated or shortened.

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[30] See, e.g., Keyspan Generation, LLC, 105 FERC ¶ 61,391 (2003) at P 27; see also West Texas Utilities Company, 18 FERC ¶ 61,189 (1982) (defining "substantially excessive.")

[31] See Motion for Leave to Answer and Answer of Applicants at 5 ("ISO-NE's concern regarding over-collection could easily be remedied by NRG Energy, Inc. ('NRG') refunding monies earned in excess of the Stipulated Bid levels after the effective date of the RMR Agreements. The refunds could be accomplished by either a cash refund to ISO-NE, or through a reduction in the Monthly Fixed Cost Charge payable to Applicants pursuant to section 3.3.2 of the RMR Agreements. Applicants believe that either approach would be appropriate.").

[32] Applicants' Transmittal Letter at 19.

Commission Response.

28. The Commission will condition the RMR Agreements to terminate immediately upon the implementation of the LICAP mechanism or regional deliverability requirements in Docket No. ER04-563-030. As noted above, when the Commission implemented the PUSH mechanism, we stated that the PUSH rules would be a temporary measure, to be replaced by a long-term market solution, in the form of LICAP or regional deliverability requirements. While the Commission recognizes that PUSH was not effective for the uniquely situated, aging generating units at issue here, and is accepting the RMR Agreements, the Commission remains committed to the implementation of a market-based mechanism to appropriately compensate generators providing reliability services. By conditioning these contracts to end upon the implementation of a LICAP mechanism or regional deliverability requirements, we ensure that Applicants are adequately recovering revenues until an appropriate permanent market-based solution is in place. This condition also ensures that the generation covered by these contracts will be part of the functioning market that will develop in New England. Therefore, we do not accept the Applicants' rationale that there is a need or benefit to allowing the LICAP market or regional deliverability requirements to "stabilize" prior to terminating the RMR Agreements.

Consolidation with Docket No. ER04-23-000, et al.

29. In their filing, the Applicants request that the Commission consolidate this matter with Docket No. ER04-23-000, in which settlement judge procedures are in progress. In the December 1 Order in Docket No. ER04-23-000, the Commission accepted for filing a 12-month extension of previously-approved RMR agreements that apply to Devon Units 7 and 8, suspended the rates (proposed Reliability Charges), and instituted hearing and settlement judge procedures. The Applicants argue generally that consolidation is warranted because both proceedings involve the same parties and similar issues of law and fact, as well as similar reliability and RMR issues.[33] CT DPUC and ISO-NE support consolidation. CT DPUC also filed a motion seeking to consolidate the instant docket, Docket No. ER04-23-000 and Docket No. ER03-563-029.[34]

[33] Applicants' Transmittal Letter at 21-22.

[34] The Commission will consider CT DPUC's motion to consolidate the instant docket and Docket No. ER04-23-000, et al., with Docket No. ER03-563-029 in a subsequent order to be issued in Docket No. ER03-563-029.

30. CT OCC and CMEEC each oppose consolidation. CT OCC argues that consolidation is inappropriate because the generating units at issue in Docket No. ER04-23-000 are not eligible to bid their capacity under the PUSH mechanism due to their high capacity factors, and thus are different than the units at issue in the instant docket. CMEEC opposes consolidation because, it argues, Applicants' filing amounts to a collateral attack on the PUSH mechanism.[35]

Commission Response.

31. The Commission will set the remaining cost issues (aside from the ROE) for hearing and settlement judge procedures, and consolidate the instant docket with Docket No. ER04-23-000, et al., which is currently before a settlement judge. We find that consolidation is warranted because in both cases, the issues set for hearing and settlement judge procedures concern the appropriate charges under cost-of-service RMR agreements. These are common issues of law and fact that make consolidation appropriate.[36] Additionally, generating units from the Devon Station are involved in both dockets, so consolidation will simplify consideration of the allocation of costs to the various units.

The Commission orders:

(A) The proposed RMR Agreements are conditionally accepted for filing and suspended for one day to become effective January 17, 2004, subject to refund.

(B) Applicants are hereby directed to file revised RMR Agreements within 30 days of the date of this order that provide that the RMR Agreements shall terminate upon the implementation of a LICAP mechanism or regional deliverability requirements by ISO-NE, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly Sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

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[35] Motion to Intervene, Motion to Reject or, in the Alternative, Protest and Opposition to Request for Consolidation of CMEEC at 20-21.

[36] See, e.g., Midwest Independent System Operator, Inc., 103 FERC ¶ 61,090 (2003) at P 29.

Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held in Docket No. ER04-464-000, et al., concerning the justness and reasonableness of the rates contained in the RMR Agreements, as discussed in the body of this order. As discussed in the body of this order, the hearing will be held in abeyance to give the parties time to conduct settlement judge negotiations.

(D) Docket No. ER04-464-000, et al., is hereby consolidated with Docket No. ER04-23-000, et al., for purposes of hearing and decision.

(E) The settlement judge in Docket No. ER04-23-000, et al., shall determine the procedures best suited to accommodate consolidation of Docket No. ER04-464-000, et al., with Docket No. ER04-23-000, et al.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.